



July 22, 2002

Ms. Genevieve G. Stubbs
Senior Associate General Counsel
The Texas A&M University System
301 Tarrow, 6th Floor
College Station, Texas 77840-7896

OR2002-4014

Dear Ms. Stubbs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165973.

The Office of the Texas State Chemist (the “state chemist”) received a request for information and data submitted by Star Horse Products, Inc. (“Star Horse”) and W.F. Young, Inc. (“Young”). The state chemist takes no position as to whether the requested information is excepted from public disclosure. The state chemist informs us, however, that Star Horse and Young have objected to the release of the requested information. Thus, the state chemist believes that this request for information implicates the proprietary interests of these private parties. The state chemist notified Star Horse and Young of their right to submit arguments to this office as to why the requested information should not be released.¹ The state chemist also submitted the requested information. We also received correspondence from Star Horse and Young. We have considered all of the private parties’ arguments and have reviewed the submitted information.

First, we address Young’s assertion that some of the submitted information is not responsive to this request for information. Young contends that the information relating to Young that the state chemist has submitted does not pertain to the product specified by the requestor, “Absorbine Flex +.” The state chemist represents to us, however, that the submitted information that relates to Young has been determined to be responsive to this request for information. Under these circumstances, this office must rely on the state chemist’s determination that the submitted information relating to Young is responsive to the request.

¹See Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under chapter 552 of Government Code in certain circumstances).

See Open Records Decision No. 561 at 8 (1990) (governmental body is required to make good-faith effort to relate a request to responsive information).

Next, we note that the state chemist has not complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information may be withheld from public disclosure. Section 552.301(b) provides that “[a] governmental body must ask for the attorney general’s decision and state the exceptions that apply . . . not later than the tenth business day after the date of receiving the written request [for information].” Section 552.302 provides that “[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.”

In this instance, the state chemist did not request our decision within the ten business day period prescribed by section 552.301(b). Therefore, the requested information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from public disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is made confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Star Horse raises sections 552.101 and 552.110 of the Government Code with respect to its information. Young asserts that its information is confidential and also raises section 552.104 of the Government Code. Thus, as the private parties have asserted claims that can provide compelling reasons for non-disclosure under section 552.302, we will address their arguments.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception protects information that is considered to be confidential under other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (information made confidential by statute) 611 at 1 (1992) (common-law privacy). Neither Star Horse nor Young has directed our attention to any law under which any of the submitted information is deemed to be confidential for purposes of section 552.101, nor are we aware of any such law. Therefore, none of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” This exception protects the interests of governmental bodies, not the proprietary interests of a private party such as Young that has submitted information to a governmental body. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Furthermore, section 552.104 is a

discretionary exception to disclosure that a governmental body may waive and does not constitute a compelling reason for non-disclosure under section 552.302 of the Government Code. *See* Open Records Decision Nos. 630 at 3 (1994), 592 at 8 (1991). Therefore, none of the information that relates to Young may be withheld from disclosure under section 552.104.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case

for the exception and no one submits an argument that rebuts the claim as a matter of law.² See Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) of the Government Code excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See also Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Star Horse has not demonstrated that any of its information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. Likewise, Star Horse has not made the required factual or evidentiary showing under section 552.110(b) that the release of the information that relates to Star Horse would likely result in substantial competitive injury to the company. Therefore, none of the information that relates to Star Horse is excepted from disclosure under section 552.110.

We note, however, that the information relating to Star Horse and Young contains their bank account numbers. Section 552.136, as added to chapter 552 of the Government Code by the Seventy-seventh Legislature, makes these account numbers confidential. This new exception provides as follows:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the bank account numbers that the state chemist must withhold under section 552.136.

The submitted documents also contain an e-mail address that may be confidential under section 552.137 of the Government Code. This new exception, which the Seventy-seventh Legislature added to chapter 552 of the Government Code, provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked the e-mail address of a private individual that appears in the submitted documents. The state chemist must withhold this e-mail address under section 552.137, unless the individual to whom it belongs has affirmatively consented to its public disclosure.

Lastly, we note that some of the submitted information is protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). However, an officer for public information must comply with the copyright law and is not required to furnish copies of information that is copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the state chemist must withhold the bank account numbers under section 552.136 of the Government Code. The state chemist must also withhold the e-mail address under section 552.137, unless the private individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. With those exceptions, the state chemist must release the submitted information. In doing so, the state chemist must comply with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

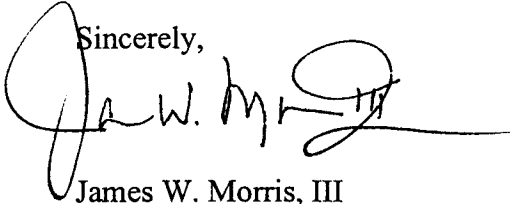
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large, stylized initial "J" and a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 165973

Enc: Marked documents

c: Ms. Hope McColm
Manager of Regulatory Affairs
Farnam Companies, Inc.
301 W. Osborn Road
Phoenix, Arizona 85013
(w/o enclosures)

Mr. Jim Swanner
Director, Operations and Administration
Star Horse Products, Inc.
5315 Avenida Encinas, #232
Carlsbad, California 92008
(w/o enclosures)

Ms. Louise A. Chartier
Registrations Manager
W.F. Young, Inc.
302 Benton Drive
Springfield, Massachusetts 01102-0014
(w/o enclosures)